Not reportable

THE SUPREME COURT OF APPEAL OF SOUTH AFRICA
JUDGMENT

Case no: 645/2011

In the matter between:

MINISTER OF PUBLIC SERVICE
AND ADMINISTRATION Appellant

and

MIRRIAM JABULILE NGWENYA Respondent

Neutral citation: *Minister of Public Service and Administration v Ngwenya* (645/11) [2012] ZASCA 109 (29 August 2012)

Coram: MPATI P, NUGENT, PONNAN, MALAN and WALLIS JJA.

Heard: 23 August 2012

Delivered: 29 August 2012

Summary: Resolution of the Public Service Bargaining Council and Public Service Dispensation Determination – interpretation – jurisdiction of high court – power of court to order amendment of collective bargaining agreement and consequent determination.

ORDER

On appeal from: Gauteng North High Court (Webster J sitting as court of first instance) it is ordered that:

The appeal is upheld with costs and the order of the court below is altered to one dismissing the application with costs.

JUDGMENT

WALLIS JA (MPATI P, NUGENT, PONNAN and MALAN JJA concurring)

[1] Ms Ngwenya, the respondent, is employed by the Department of International Co-operation and International Relations. Early in 2011 she was told that she had been posted to the South African diplomatic mission in Norway, which would require her to live in Oslo for the following four years. She wanted to take her two grandchildren, the children of her two daughters, with her, because as the only family member in employment she had been responsible for their maintenance and upbringing. In order to facilitate this she entered into parental rights and responsibilities agreements, under s 22 of the Children's Act 38 of 2005, with her daughters in respect of her grandchildren, which permitted her to take them to Norway and to arrange for their education and religious upbringing as well as obliging her to maintain them.

[2] On the footing of these arrangements Ms Ngwenya claimed to be entitled to receive in respect of each of the grandchildren the children's allowance afforded to persons in the foreign service who are appointed to posts abroad. The Department of International Co-operation and International Relations referred the application to the Department of Public Service and Administration, which is the department responsible for issues relating to the benefits of public servants. It rejected the request because the relevant collective agreement and ministerial determination did not permit Ms Ngwenya to receive the children's allowance. Ms Ngwenya accordingly instituted the present proceedings to obtain relief directed at securing her entitlement to the allowance in respect of her grandchildren. She succeeded before Webster J and the Minister of Public Service and Administration (the Minister) appeals with his leave. Ms Ngwenya has, however, decided not to participate in this appeal.

[3] When members of the public service are posted to South Africa's foreign missions abroad they are entitled to receive certain allowances designed to ensure that they are able to perform a service and maintain a standard of living commensurate with the image which the government wishes to project abroad. The nature and extent of these allowances is negotiated in the Public Service Co-ordinating Bargaining Council and embodied in resolutions that are collective agreements in terms of s 214 of the Labour Relations Act 66 of 1995. The resolutions are then incorporated in determinations issued by the Minister in terms of s 3(4)(b) of the Public Service Act, 1994.[1] In the present case the relevant resolution is resolution 8 of 2003, as amended by resolution 1 of 2008. The original Foreign Service Dispensation Determination was issued with

[1] The Public Service Act, 1994 is contained in Proclamation 103 published in Government Gazette 15791 of 3 June 1994.

effect from 1 December 2003 and was amended in accordance with resolution 1 with effect from 1 April 2010.

[4] Resolution 8 of 2003 provides that foreign service officials posted abroad are entitled to claim and receive a children's allowance in respect of all dependent children. A dependant child is defined as meaning 'a biological or adopted child or a stepchild for whose care the employee is legally responsible'. That definition was incorporated in the determination published by the Minister and was unaltered by the changes brought about by the amendments agreed upon in 2008.

[5] Ms Ngwenya recognised that her situation in relation to her grandchildren did not fall within this definition. She accordingly asked the high court for an order amending the definition in both the resolution and the ministerial determination by including, after the reference to a stepchild:

'a child whereof the parental responsibilities and rights agreement has been registered with the Family Advocate or has been made an order of the High Court in terms of Section 22 of the Children's Act 38 of 2005.'

The high court granted that order, subject to a condition that its order would remain in force until such time as the Public Service Co-ordinating Bargaining Council had re-negotiated the definition. The judgment is silent on what was to happen if it had been re-negotiated on the same terms or at least on terms that did not cater for persons situated such as Ms Ngwenya.

[6] Ms Ngwenya did not ask the high court to construe the resolution and ministerial determination in a way that would include her situation. She simply asked the court to amend them. Her basis for doing so was to

say that the Department of Public Service and Administration adopted an incorrect approach and 'shows very little appreciation for the predicament that my grandchildren and I find ourselves in and can never be in the best interests of my grandchildren'. Although she made some reference in her affidavit to both the Children's Act and the constitutional rights of children, she failed to point to any provision of the former that entitled her to the relief she sought and mounted no constitutional challenge to either the resolution or the determination. In the circumstances her case lacked any discernible legal foundation.

[7] It is unnecessary to cite authority for the proposition that courts do not have the power to amend contracts or collective agreements or to direct ministers of state to amend the proclamations they issue in the absence of some statutory or constitutional ground for doing so. A reading of the judgment suggests that the judge was moved to grant the order that he did by a sense that Ms Ngwenya's situation was anomalous in the light of the fact that an adopted child fell within the definition and he regarded the arrangements she had made as analogous to adoption. That is not a legal basis for the grant of the relief that she was seeking. It may provide a reason for the parties to the collective agreement to negotiate an amendment of the definition but that is for them, not the courts, to determine.

[8] The appeal must accordingly be upheld and the order of the court below replaced by one dismissing the application. Those orders carry with them orders for costs but I see no reason why those costs should include the costs of two counsel. The case is not of such complexity as to warrant the Minister taking that precaution. Accordingly the appeal is

upheld with costs and the order of the court below is altered to one dismissing the application with costs.

M J D WALLIS
JUDGE OF APPEAL

Appearances

For appellant:	B R Tokota SC (with him M Gwala) Instructed by: State Attorney, Pretoria and Bloemfontein
For respondent:	None